

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CATHERINE MCKOY, et al, : Docket #18-cv-09936
Plaintiffs, :
-against- :
THE TRUMP CORPORATION, et al., : New York, New York
February 16, 2023
Defendant.

-----:

PROCEEDINGS BEFORE
THE HONORABLE SARAH L. CAVE
UNITED STATES MAGISTRATE JUDGE

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THE COURT: Good afternoon. This is Magistrate Judge Cave. We're here for a conference in McKoy versus The Trump Corporation, Case Number 18-cv-09936.

May I have appearances starting with the plaintiff, please.

MR. QUINN: Good afternoon, your Honor. John Quinn, from Kaplan Hecker, on behalf of the plaintiff. I'm here with my partner, Roberta Kaplan.

THE COURT: Okay. Good afternoon.

MR. SHAPIRO: Good afternoon. This is Peter Shapiro, from Lewis Brisbois, for defendants.

THE COURT: Okay. Good afternoon. All right. So we're here on the plaintiffs' letter regarding the defendants' experts at ECF number 511.

I was hoping, Mr. Quinn, you might be able to just back up a step or two for me. I understand that there are three -- I guess defendants have four experts, Dr. Peterson, and then three rebuttal experts. Could you just, at a very high level, sort of one sentence or phrase, just tell me what each of these experts were opining on?

MR. QUINN: Sure. Defendants' affirmative

1 expert is Dr. Peterson, who opines on a series of
2 surveys, a number of preexisting surveys of NLM
3 participants and one survey that he conducted
4 himself.

5 THE COURT: Okay.

6 MR. QUINN: He's an affirmative expert. I
7 should mention he was disclosed to us as a rebuttal
8 expert, but ultimately no rebuttal report was
9 served. So that's Dr. Peterson.

10 THE COURT: Mr. Quinn, it's really hard for
11 me to hear you. I don't know if you have a better
12 angle on your phone that you can use.

13 MR. QUINN: All right, I just changed. Is
14 this better, your Honor?

15 THE COURT: That is much better. So the
16 first, you said about Dr. Peterson, and I didn't get
17 anything after that.

18 MR. QUINN: Then there are three rebuttal
19 experts. Dr. Hare is an expert on, roughly
20 summarizing here, IBO compensation and sort of the
21 economics around the ACN business opportunity.
22 Mr. Crandon is more of a technical expert on certain
23 aspects of the ACN video phone. And Dr. Cunningham
24 is an expert on what I call "the endorsement."

25 THE COURT: Okay.

1 MR. QUINN: The general effects of
2 celebrity endorsements and the nature of this
3 endorsement in particular.

4 THE COURT: Okay. So those all seem pretty
5 substantive, sort of merits related. How do they
6 tie into the imminent class certification motion, if
7 at all?

8 MR. QUINN: Yeah, I think difficult to
9 know. Any one of them, depending on how the
10 testimony develops, could be related to that. I
11 think the most related to the class certification
12 issues is probably Dr. Hare, who opines on the
13 nature of the business opportunity, whether people
14 had consistent or inconsistent experiences and the
15 like.

16 THE COURT: Okay. Now, with respect to the
17 four meetings in January that are the basis for your
18 seeking to preclude the experts, what does the
19 report say about those meetings? In other words, in
20 the report, is there a quote or a summary of what
21 was learned from the ACN executive, or is it just
22 merely a citation to the fact of that meeting?

23 MR. QUINN: So I'll take them into three
24 groups. Dr. Peterson, because his report, his
25 affirmative report, was finalized prior to the

1 meetings, while he went on to learn things at those
2 meetings, there's no reference to it in the report,
3 nor could there have been, because the meetings had
4 not yet happened.

5 For Mr. Crandon and Dr. Cunningham, the
6 reports make no mention of the meetings whatsoever,
7 even though they were in three days of meetings.
8 And that's both in the actual text of the reports as
9 well as in the lists of materials considered, none
10 of which included or referenced these meetings. So
11 those reports are entirely silent.

12 Dr. Hare's report includes nine references
13 to meetings or communications with ACN executives
14 sprinkled in various places throughout the report.
15 And those references often do include -- the
16 references themselves include no substantive summary
17 of what specifically was said. There's no quote or
18 anything. There are specific data points. They say
19 things like 30 percent of ACN IBOs renew after a
20 first year, and then in parentheses say,
21 conversation with ACN executives, but without any
22 disclosure of who said what exactly or based on what
23 data or anything like that. So they're cited for
24 various propositions in the report, but no actual
25 summary of the discussion or quotation from it is

1 included.

2 THE COURT: Okay. And you haven't deposed
3 any of the four experts as yet, correct?

4 MR. QUINN: As of yet, that's correct.

5 THE COURT: Do you need to take those
6 depositions before the class certification motion is
7 filed next week?

8 MR. QUINN: In full candor, your Honor, we
9 have a draft of the brief. We think it's strong. I
10 don't know that we need anything from these experts
11 to make that motion, although, you know, as I hope
12 the Court can understand, we obviously have some
13 discomfort about making a significant dispositive
14 motion like that while the record is still open or
15 unsettled.

16 So were this motion to preclude not to be
17 granted, I think our preference would be that there
18 be some adjustment so that we have a complete record
19 before we make that motion. But should the Court
20 direct otherwise, we will be able to meet the
21 deadline and can deal with it and reply.

22 THE COURT: Okay. And without giving too
23 much away, is part of your argument that -- is part
24 of your argument in the motion that what the
25 defendants' experts are going to say doesn't

1 undermine any of your arguments, or are you just
2 saving that for reply?

3 MR. QUINN: I think, as with all good
4 advocacy, we'll try to get ahead of it to some
5 degree, but, yeah, we're making our arguments
6 primarily based on the record evidence and the data
7 from ACN and, of course, the record about the
8 endorsement and promotion statements that were made
9 and how those were encapsulated.

10 I mean, part of the core of it, really, is
11 there were only a couple of video recordings over
12 the ten-year period, and so the statements that were
13 made, the promotional statements, are really a small
14 and central library that was used and then repeated
15 over and over and over again. So that is,
16 obviously, a key focus of the motion that I don't
17 know is affected by these experts.

18 You know, and then to the extent we get
19 into the idea that people that had consistent
20 experiences in ACN, they relied in a consistent way
21 and then they experienced the falsity and resulting
22 damage in similar ways. You know, those I think, we
23 have a strong record from fact discovery for. I do
24 think Dr. Hare's testimony in particular will
25 intersect with those issues. But should we need to

1 address that on reply, I think we can. And the
2 other experts, I think, will be even more ancillary
3 to the motion.

4 THE COURT: Okay, thank you. All right.

5 So, Mr. Shapiro, after I agreed with you
6 twice that Mr. Stevanovski didn't have any -- that
7 the plaintiffs didn't have any compelling need to
8 depose him, it seems rather bold of me that you
9 would then go stick him in a meeting with your
10 experts. Do you want to explain that?

11 MR. SHAPIRO: Well, I would say this.
12 First of all, the first go-round was, obviously, ACN
13 that was objecting to having him be deposed because
14 they took the position that Mr. Merriman, the other
15 executive, would be able to provide the information.
16 And thereafter we said we think there's been enough
17 disclosure about ACN. And I don't think any
18 compelling showing was made that anything unique to
19 Stevanovski was required.

20 THE COURT: I'm so sorry, Mr. Shapiro, to
21 interrupt you. I'm having a similar problem hearing
22 you. I don't know if it's just my phone line that's
23 bad today, but you're sort of going in and out --

24 MR. SHAPIRO: Oh, sorry.

25 THE COURT: -- and I'm hearing about every

1 other word.

2 MR. SHAPIRO: Sorry about that. Is this
3 any better?

4 THE COURT: Not really. Are you on a
5 landline?

6 MR. SHAPIRO: I am on a landline. I'm not
7 sure what I can do. Let me see if I can raise the
8 volume.

9 THE COURT: No, it's sort of crackling.
10 Perhaps could I just ask you to hang up and dial
11 back in? Maybe you'll just get a better signal.

12 MR. SHAPIRO: Yeah, that's a good idea.
13 I'll do that right now.

14 THE COURT: Thank you. We'll just hold on
15 a minute.

16 (Pause)

17 MR. SHAPIRO: Hi. It's Peter Shapiro
18 again. Is this better?

19 THE COURT: It's kind of the same problem.
20 Go ahead. We'll do our best. If I --

21 MR. SHAPIRO: Maybe I should try on my cell
22 phone. It would be kind of odd for that to be
23 better, but I don't want to -- you know, I'm having
24 trouble hearing you now, actually. So let me hang
25 up and try one more time. Sorry.

1 THE COURT: Thank you.

2 (Pause)

3 MR. SHAPIRO: Hi. Peter Shapiro again.

4 THE COURT: Wonderful.

5 MR. SHAPIRO: Better?

6 THE COURT: Clear as a bell. Go ahead.

7 MR. SHAPIRO: Okay. Let's hope it stays
8 that way. I'll rub my rabbit's foot.

9 So I'll start over again because I wasn't
10 audible, apparently. The first objection was by ACN
11 that there really was no need for two depositions
12 and that the Merriman deposition should be
13 sufficient. And thereafter we took the position
14 that there really wasn't a showing that another
15 deposition was needed and that any information that
16 plaintiffs could acquire hadn't been provided. And
17 I don't believe there was ever any showing of what
18 was missing.

19 In response to having seen the plaintiffs'
20 expert reports, evidently ACN was quite exercised
21 about feeling that they were inaccurate and
22 problematic and volunteered to provide some
23 information. And I didn't control whether they --
24 you know, Mr. Stevanovski was deposed or not.
25 Obviously, I took a position, but it was up to him

1 to decide that he could participate in a couple --
2 not a couple, but several phone calls. I think he
3 was on three of them, and they were not long phone
4 calls or detailed phone calls with review of
5 documents and so forth. And what Mr. Quinn
6 recounted about who participated wasn't quite
7 accurate. I can get into that if you'd like.

8 THE COURT: Okay. Yeah, please tell me who
9 did participate.

10 MR. SHAPIRO: Yeah. Cunningham was on two
11 calls. Crandon was on one call, in which he was the
12 only person speaking to the ACN people. And in the
13 two calls that Cunningham was on, Hare and Peterson
14 were also there. And Hare and Peterson were on one
15 additional call. And on one of those calls, I
16 believe Stevanovski was not participating.

17 THE COURT: Okay. And you or someone from
18 defendants' counsel participated in each of these
19 calls?

20 MR. SHAPIRO: Yes, I was there and ACN's
21 counsel was there.

22 THE COURT: Okay.

23 MR. QUINN: Your Honor --

24 MR. SHAPIRO: There were no emails, by the
25 way.

1 THE COURT: Right, but we have partial
2 notes from Mr. Crandon, right?

3 MR. SHAPIRO: Right. Well, that apparently
4 is all his notes, but they're clearly not very
5 enlightening.

6 THE COURT: Okay. Mr. Quinn, I'm sorry.
7 Go ahead.

8 MR. QUINN: Yes. Thank you, your Honor.

9 I don't have the protective order
10 immediately in front of me, but this is actually the
11 first time we've learned that our expert reports,
12 which were all designated confidential and served on
13 defendants, apparently were shared with ACN and that
14 their reaction to them is what prompted these
15 meetings. That's a new disclosure for us. And just
16 candidly, my initial reaction is that I'm not sure
17 that that's permitted or appropriate under the
18 protective order and discovery rules.

19 THE COURT: Okay.

20 MR. SHAPIRO: My response to that would be
21 that they signed the protective order, just like the
22 experts and presumably the others, and that's why
23 they have access to them.

24 THE COURT: Well, that's good. But if
25 they're not -- I don't have the protective order in

1 front of me, but if they weren't one of the
2 categories of people who could be shown something
3 designated confidential, just because they signed
4 the certification doesn't necessarily excuse them.

5 Again, let's set that issue to the side,
6 because, obviously, as Mr. Quinn said, he's just
7 learning about it, and none of us have the
8 protective order in front of us.

9 All right, well, so your letter,
10 Mr. Shapiro, suggests -- you request or suggest that
11 you could do supplemental reports. With those
12 reports from the four experts, would they be able to
13 describe with some substance what information they
14 learned during each of the calls they participated
15 in?

16 MR. SHAPIRO: Well, you know, I'm not sure
17 to what extent. I have the impression for
18 Dr. Cunningham that she has no real recollection of
19 anything in particular that was said and that she
20 would say she didn't use anything from those
21 conversations in her report.

22 I think for Hare and Peterson -- you know,
23 Hare, we know what he relied on because he cited it
24 in his report. Peterson didn't rely on anything,
25 although he may have learned some things, so he

1 could probably describe what he learned.

2 Crandon was really limited more
3 specifically to the video phone issue. And I think
4 he probably would be able to say what he learned,
5 which was in the nature of where the video phone
6 came from and the extent of what ACN did in trying
7 to market that phone.

8 THE COURT: Okay. How soon could you do
9 these supplemental reports?

10 MR. SHAPIRO: Well, obviously I have to
11 speak to the experts about their time frames. I
12 have no reason to think that they're not available.
13 So I think, to be safe, I would say ten days would
14 be an appropriate amount of time. And if I can get
15 them done sooner -- for example, Cunningham's may be
16 quite brief, I would certainly endeavor to do so.

17 THE COURT: Okay. All right.

18 Well, I know, Mr. Quinn, that's probably
19 not going to satisfy you, but aside from
20 supplementing their reports with a description about
21 what it is they learned or didn't learn in these
22 meetings, is there anything else that could help
23 with the prejudice that you perceive?

24 MR. QUINN: Respectfully, your Honor, and
25 without, of course, any intention to aggravate the

1 Court, we do think at this point there are grounds
2 to renew the request to depose Mr. Stevanovski. I
3 mean, it's clear that he had material information
4 that he felt personally compelled to share with each
5 of these experts on every subject covered by their
6 reports.

7 And, again, he's the founder, CEO, the
8 principal person who led this relationship. I mean,
9 I just refer back to our prior filings as to his
10 unique role as a fact witness. And we understood
11 the burden issues and everything else, but having
12 sort of voluntarily now injected himself into this
13 process and shared information with people, yeah,
14 respectfully, I think we should have a chance to
15 depose him.

16 THE COURT: Yeah, no, I tend to agree with
17 you. It's the point that I made to Mr. Shapiro a
18 few minutes ago. Despite having gotten a pass
19 twice, he nevertheless waived that, so to speak, I
20 guess, by making himself suddenly important when we
21 might have otherwise passed him by.

22 MR. SHAPIRO: I would just say perhaps ACN
23 should be given an opportunity to state their
24 position about that before you rule. I can show a
25 rule and saying ACN should show cause or something

1 of why he shouldn't be deposed.

2 THE COURT: Well, is ACN on this call? Do
3 we have counsel for ACN on this call?

4 MR. SHAPIRO: No. I didn't alert them that
5 this might be an issue. It didn't occur to me that
6 that might be something --

7 THE COURT: Why not? I mean, it's the
8 fourth line of the plaintiffs' letter. Why not?
9 Why should we waste any more time on this?

10 MR. SHAPIRO: Well, your Honor, I
11 understand. I apologize for that. It just simply
12 didn't occur to me. And I suppose that if you issue
13 an order saying that Mr. Stevanovski should be
14 deposed and they want to object, that's going to be
15 up to them.

16 THE COURT: Yeah, I certainly think there's
17 good cause to order it. And if they felt -- well,
18 obviously, they may not have known it. All right.

19 So then I assume, Mr. Quinn, you want those
20 reports and then proceed with the experts'
21 depositions, right?

22 MR. QUINN: I think ideally, yes, your
23 Honor, we would get the supplemental disclosures so
24 we have as much of the disclosed factual material as
25 possible, and I think preferably then depose

1 Mr. Stevanovski, followed quickly by the experts.
2 And, you know, understanding it's a firm trial date
3 with absolutely no intention of ever putting that at
4 risk, if we could have some adjustment to the class
5 certification deadline just to complete those -- I
6 mean, we have outlines for all of them. We're ready
7 to move as quickly as they can make themselves
8 available.

9 THE COURT: Yeah, I can't do that. That's
10 Judge Schofield's deadline, so you would need to ask
11 her. I mean, what I was trying to get at is -- a
12 few minutes ago when you and I were speaking, was
13 that it seems to me like you have most of what you
14 need. Obviously, you know, you have grounds to
15 complain about whatever it is that defendants have
16 submitted already. That may or may not be cured,
17 but you can certainly preserve your objection at
18 this point.

19 And then, as I see it, you'll have the
20 opportunity on reply -- certainly by the time of the
21 reply, which is April 7th, hopefully all of this
22 would be done, and so you'll have an opportunity
23 there to either say what you know based from the
24 supplemental declarations and the depositions. And
25 then, obviously, a summary judgment, I assume,

1 whether the experts are in or out, will be something
2 that you'll be raising.

3 So I guess the bottom line is if you want
4 to change the class certification deadlines, you're
5 going to have to ask Judge Schofield. I can't do
6 that. But consider -- you know, in light of how
7 important staying on schedule is for keeping the
8 trial date, just consider whether you really need to
9 do that or not. But that's obviously your decision
10 to make.

11 MR. SHAPIRO: Your Honor, can I just raise
12 one point that's relevant to that? And this is a
13 very unfortunate turn of events in the last 24
14 hours, but one of my partners, who was slated to
15 work on this class certification opposition, passed
16 away yesterday.

17 THE COURT: Oh, I'm sorry to hear that.

18 MR. SHAPIRO: So we're all kind of reeling
19 here from that, young fellow and had some illness
20 and took a turn for the worse, unfortunately.

21 And so I'm hoping that I'll be able to
22 slide someone else in to work on the class
23 certification opposition, but just from a logistics
24 point of view and my firm having some additional
25 time to put our team back together and have somebody

1 ready to start working on that class certification
2 motion when it's received, you know, at least a
3 couple more weeks would be ideal from our end.

4 THE COURT: Okay. I understand. It's just
5 I'm not at liberty to change the Judge Schofield's
6 previous schedule, so you can certainly explain that
7 to her.

8 So I guess where I'm coming out, as it's
9 probably clear at this point, is that the
10 plaintiffs' motion to preclude the defendants'
11 experts would be denied today without prejudice.
12 The steps that we'll take next is within ten days,
13 which takes us to -- we'll calculate what that is in
14 a second -- that there will be supplemental reports
15 or affirmations or declarations from each of the
16 four defendants' experts specifically addressing the
17 calls that they participated in with the ACN
18 individuals. And then we'll proceed to depose those
19 experts.

20 And, in addition, I will order that
21 Mr. Stevanovski sit for a two-hour deposition
22 limited to the topic of the meetings that he
23 participated in with the defendants' experts, and if
24 defendants think there is good cause to have it
25 beyond that, you can come back to me. But at this

1 point that's the quote-unquote burning issue that I
2 was looking for before and thought was absent and
3 now feel is present. So this definition would just
4 be limited to that subject matter.

5 Okay. Mr. Quinn, anything else you'd like
6 me to consider?

7 MR. QUINN: Two things, your Honor. First,
8 on the Stevanovski deposition, just in light of the
9 way this touched all four reports and the nine
10 distinct references in Hare's report, if the Court
11 might consider giving us even three or four hours, I
12 think we may need it to get through this
13 productively, especially given that a lot of these
14 are reference data points, and if he says that there
15 is some data, we need to make sure we get into it
16 and understand what that support is or, if needed,
17 take a break to pull a document out of the discovery
18 record. So just trying to really foresee in a very
19 realistic way what that's likely to be,
20 understanding that the Court wants us to be
21 efficient.

22 THE COURT: Yeah. I meant two hours on the
23 record, so I can be clear about that. So if you
24 need to take breaks or anything, that won't count
25 against you.

1 MR. QUINN: Understood, your Honor. I'll
2 put in one last request for three or four, but
3 understand and we'll await the Court's order.

4 THE COURT: I'm optimistic that you can be
5 efficient and do it in two. If you've had two and
6 you need to call me and ask me for more time, you
7 can do so.

8 MR. QUINN: Understood. Thank, your Honor.

9 THE COURT: Okay.

10 MR. QUINN: And the only other point, on
11 the scheduling front, we'll reach out to Mr. Shapiro
12 and I'll add our condolences, in addition to the
13 Court's, and we'll see if we can work some minor
14 adjustments out that in no way affect the trial
15 date, which the Court knows is still a ways off.

16 THE COURT: Yes.

17 MR. QUINN: So hopefully we can work that
18 out and bring a stipulation to Judge Schofield early
19 next week and we'll work in good faith to do that.

20 THE COURT: Great. So hang on just one
21 second.

22 Okay, so I'm just going to add in an extra
23 day because of the holiday. So February 28th will
24 be the deadline for the supplemental expert report.
25 And do we need to set a deadline for getting expert

1 depositions and Mr. Stevanovski's deposition done,
2 Mr. Quinn? Or is that sort of something you think
3 you can work out?

4 MR. QUINN: I suppose I'd propose in the
5 first instance that we work with defendants and ACN
6 to get availability and see if we can develop a
7 workable schedule and bring it to the Court, and in
8 the event of disputes or an inability to do so,
9 we'll just let the Court know that.

10 THE COURT: Is that all right with you,
11 Mr. Shapiro?

12 MR. SHAPIRO: Yes, thank you.

13 THE COURT: Okay, great. On your side,
14 Mr. Shapiro, anything else you'd like to raise, or
15 any clarification?

16 MR. SHAPIRO: No, I think it's been very
17 clear. Thank you.

18 THE COURT: Okay.

19 MR. SHAPIRO: Clearer than my phone line,
20 in any event.

21 THE COURT: Clearer than your phone. All
22 right. Well, again, condolences to you and your
23 colleagues, and you will see an order from us
24 shortly this afternoon.

25 Thank you very much, everyone. We'll be

1 adjourned.

2 MR. SHAPIRO: Thank you. Bye.

3 MR. QUINN: Thank you, your Honor.

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C E R T I F I C A T E

I, Marissa Mignano, certify that the foregoing transcript of proceedings in the case of CATHERINE MCKOY, et al. v. THE TRUMP CORPORATION, et al., Docket #18-cv-09936, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Marissa Mignano
Marissa Mignano

Date: February 23, 2023